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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PATRICK LEONARD TIERNEY,

11 Plaintiff,

12 v.

13 CARRINGTON MORTGAGE SERVICES,
14 LLC, et al.,

15 Defendants.
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Case No. C20-1245RSM

ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION

17 **I. INTRODUCTION**

18 This matter comes before the Court on Plaintiff Patrick Leonard Tierney's Motion for
19 Preliminary Injunction. Dkt #12. Defendants Carrington Mortgage Services, LLC
20 ("Carrington") and the Bank of New York Mellon ("BONY") oppose. Dkt. #18. The Court
21 has determined that oral argument is unnecessary. The Court has reviewed the briefing and
22 supplemental briefing and now rules that Plaintiff's Motion for Preliminary Injunction is
23 GRANTED as set forth below. Defendants' Motion to dissolve TRO, Dkt. #11, will be
24 GRANTED IN PART as the preliminary injunction renders the TRO moot.
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II. BACKGROUND

A. Procedural History

This case concerns Defendants' handling of Plaintiff Tierney's home loan and attempts to pursue foreclosure. Mr. Tierney brings claims against Defendants for violations of Washington's Consumer Protection Act ("CPA"), the Real Estate Settlement Procedures Act ("RESPA"), the Fair Debt Collections Practices Act ("FDCPA"), the Truth in Lending Act ("TILA"), the Equal Credit Opportunity Act ("ECOA"), as well as a claim for declaratory and injunctive relief and negligence. *See* Dkt. #1-6. The background facts of this case have previously been set forth by the Court's Order on Defendants' Motion for Partial Summary Judgment and the Court incorporates those facts by reference. *See* Dkt. #27. The Court will focus on those facts more relevant to this Motion.

As a result of Mr. Tierney's default on his home loan, the matter was referred to Aztec Foreclosure Corporation ("Aztec") to commence the non-judicial foreclosure proceedings against the Property, and Aztec issued a Notice of Default on October 25, 2019. Dkt. #4 at 136-141. On December 9, 2019 Aztec recorded a Notice of Trustee's Sale ("NOTS"), setting a sale date of April 17, 2020. *Id.* at 148-153. The sale was postponed to June 19, 2020, and then again to July 24, 2020. Dkt #11-2, ¶1. Mr. Tierney managed to stop the sale by filing a lawsuit with a motion for temporary restraining order ("TRO") in state court. Dkt. #1-5.

On July 22, 2020, the state court granted Tierney's TRO pending an August 20, 2020, preliminary injunction hearing. The court issued the following finding:

This Court finds that Tierney is entitled to equitable relief based upon evidence presented that the conduct and statements of Defendants lulled Tierney to believe that the July 24, 2020 foreclosure auction had been postponed. On July 15, 2020, Tierney learned for the first time that the auction had not been postponed. By that time, Tierney had no ability to prevent the sale other by

1 filing the pending ex parte application for injunctive relief. Neither
2 Carrington nor Aztec offered evidence or argument in opposition
3 to this finding.

4 Dkt. #4-1 at 136.

5 As bond for the order, Mr. Tierney was required to make monthly deposits into the
6 court registry in the amount of \$1,889.51. *Id.* at 137.

7 The preliminary injunction hearing never happened in state court because Defendants
8 removed to this Court prior to the above date. Mr. Tierney later filed the instant Motion.

9 **B. Communications between the Parties about Mortgage Assistance**

10 Back on April 30, 2019, prior to any type of delinquency notice from Defendants, Mr.
11 Tierney's attorney called the mortgage servicer Carrington to disclose the death of Mr.
12 Tierney's wife and of his need for mortgage assistance. One week later, Carrington sent Mr.
13 Tierney a Notice of Pre-Foreclosure Options. Dkt. #4-1 at 63. Mr. Tierney's attorney
14 contacted Carrington again on May 14, 2019, regarding the Notice of Pre-Foreclosure Options
15 and reiterated Tierney's need of mortgage assistance. *Id.* at 71.

16 Mr. Tierney submitted what he thought was his completed request for mortgage
17 assistance ("RMA") application to Carrington on May 31, 2019. *Id.* at 37. On June 4,
18 Carrington acknowledged receipt of the application and requested additional documents. *Id.* at
19 43. The June 4 letter states that Carrington "must receive the... documentation no later than
20 06/19/2019" and that "[f]ailure to submit all required documentation by 06/19/2019 may result
21 in ineligibility for a workout option and, unless prohibited by law, any applicable foreclosure
22 proceedings will continue..." *Id.* Three days later Carrington sent Tierney a letter stating that
23 it had that it has been trying to reach him and that it was critical that he make contact
24 immediately in order to seek mortgage assistance avoid foreclosure. *Id.* at 45.

1 On June 24, 2019, Mr. Tierney alleges he provided Carrington with the documents
2 requested in its June 4, 2019 letter. *Id.* at 43. Thirty days later, Carrington sent Tierney a
3 “Notice of Cancellation” stating that his RMA application had “been cancelled because we did
4 not receive all documents to complete our review process.” *Id.* at 54.

5 On August 29, 2019, Mr. Tierney sent a letter to Carrington and Aztec stating “[o]n
6 May 31, 2019, I submitted to Carrington a completed application of Request for Mortgage
7 Assistance (“RMA”).... This week I received a one-page document from Aztec Foreclosure
8 Corporation.... The document contains no reference to the pending RMA.... The document
9 further states that if I do not respond within 30 days, I will waive the right to dispute some issue
10 relevant to the loan.” Dkt. #18-1 at 61. Mr. Tierney writes “...please consider this letter
11 formal written notification that I am seeking a modification of this loan due to financial
12 distress. I have submitted an RMA and am awaiting a response regarding next steps.” *Id.*

13 In briefing, Defendants characterize this letter as “a new request form the Plaintiff
14 asking for mortgage assistance.” Dkt. #18 at 3 (citing Dkt. #18 (“Ostermann Decl.”), ¶ 8).¹
15 This letter is clearly not a new request for mortgage assistance, instead it reflects a breakdown
16 in communication. Defendants then state, in briefing, that Mr. Tierney’s request was “deemed
17 to be incomplete so additional documents were requested.... The requested documents were not
18 provided [so] a Cancellation Notice was sent.” Dkt. #18 at 3.

19 On December 10, 2019, Carrington sent Tierney a letter purporting to acknowledge an
20 RMA application submitted on December 3, 2019. Dkt. #4-1 at 84. However, Mr. Tierney did
21 not submit an RMA application on December 3. Defendants have submitted a letter from Mr.
22 Tierney’s attorney dated December 3, 2019; this letter requests “an in-person meeting for the
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28 ¹ Although Defendants cite to paragraph 8 of the declaration of Elizabeth A. Ostermann, the Court has concluded that this was in error. Paragraph 8 does not cite to any letter from Mr. Tierney. Paragraph 18 is the correct citation. This paragraph cites to an attached Exhibit that the Court has reviewed and cited to above.

1 purpose of providing Leonard with appropriate mortgage assistance.” Dkt. #18-1 at 71. The
2 letter concludes with “[p]lease consider this letter to be his formal request for a meeting and/or
3 mediation for the purpose of negotiating modifications...” *Id.* On January 11, 2020,
4 Carrington declared the purported December 2019 RMA application to be “complete.” Dkt.
5 #4-1 at 86. Two days later, Carrington denied that application on the grounds that the loan was
6 past its maturity date and therefore ineligible for a modification. *Id.* at 87.

8 On April 7, 2020, Carrington sent Mr. Tierney two letters. The first April 7 letter
9 served to “inform” Tierney that his loan was delinquent and states: “Carrington offers several
10 loss mitigation options if you are having difficulty making your mortgage payments.” *Id.* at 92.

11 The second April 7 letter purports to confirm that Mr. Tierney had requested the
12 disposal of his home by short sale. *Id.* at 91. Mr. Tierney argues he never made such request,
13 orally or in writing.

15 III. LEGAL ANALYSIS

16 Granting a preliminary injunction is “an extraordinary remedy that may only be
17 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. NRDC,*
18 *Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A party can obtain a
19 preliminary injunction by showing that (1) it is likely to succeed on the merits, (2) it is likely to
20 suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its
21 favor, and (4) an injunction is in the public interest. *Id.* at 555 U.S. 20. A preliminary
22 injunction may also be appropriate if a movant raises “serious questions going to the merits”
23 and the “balance of hardships . . . tips sharply towards” it, as long as the second and third
24 *Winter* factors are satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th
25 Cir. 2011).

1 **A. Likelihood of Success on the Merits**

2 Although Plaintiff brings many claims against Defendants, his main argument in this
3 Motion rests on the ability to obtain injunctive relief under the CPA. In order to state a claim
4 for relief under the CPA, a plaintiff must allege facts sufficient to meet each of the following
5 elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3)
6 affecting the public interest, (4) injury to a person's business or property, and (5) causation.
7 *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531
8 (1986); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 204 P.3d 885, 889 (2009).
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10 Plaintiff alleges violations of the Washington's Deeds of Trust Act ("DTA") and the
11 Real Estate Settlement Procedures Act ("RESPA"). RCW 61.24 et. seq. and 12 USC § 2601 et.
12 Seq. Violations of DTA and RESPA can constitute unfair and deceptive acts under the CPA
13 and support a claim for injunctive relief. *See Bain v. Metropolitan Mortg. Group, Inc.*, 175
14 Wn.2d 83, 118 (2012); *Brown v. Washington State Dept. of Commerce*, 184 Wn.2d 509, 531,
15 n.12 (2015); *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820 (2015); *McDonald v.*
16 *OneWest Bank*, 929 F.Supp.2d 1079 (2013).
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19 Mr. Tierney argues that Defendants violated RESPA by failing to respond to written
20 requests for information or inquiry regarding the account, *see* 12 USC §2605(e); 12 CFR
21 §§1024.31, 1024.35 & 1024.36, by engaging in "dual tracking," *see* 12 USC §2605(e) and (k);
22 12 CFR §1024.41(g), and by manufacturing grounds for denial of Mr. Tierney's RMA
23 application. *See* Dkt. #12 at 11–15 (citing, *e.g.*, 12 CFR §1024.38(b)(2)).
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25 Defendants argue that Mr. Tierney has failed at this stage to show a likelihood of
26 success on a dual tracking claim, because each of Mr. Tierney's RMAs was denied due to lack
27 of requested documents prior to the foreclosure proceedings. *See* Dkt. #18 at 9–10. The Court
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1 does not necessarily agree with Defendants. The record is very muddled on what was and was
2 not an RMA and when Defendants began to pursue foreclosure.

3 The Court is, however, even more convinced that Mr. Tierney has demonstrated a
4 likelihood of success on his other claims of RESPA violations. The record shows Carrington's
5 communications with Mr. Tierney and his attorney to be confusing, contradictory, and often
6 full of factual errors. The Court agrees with Mr. Tierney's characterization of Defendants'
7 communications as robotic:
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9 Carrington not only failed to implement the required procedures, it
10 is not clear if Tierney's application was reviewed by a live person.
11 In the year that followed the original RMA application, Carrington
12 sent Tierney a series of non-sensical computer-generated generic
13 letters, none of which addressed the substance of his RMA.

14 Dkt. #12 at 4.

15 Mr. Tierney argues that Carrington manufactured grounds for denial of his RMA
16 application by, *e.g.*, stating that the loan could not be modified because it matured on April 1,
17 2019, even though "in its letters of May 7, 2019, June 4, 2019 June 7, 2019, April 7, 2020,
18 Carrington advised Tierney that a loan modification *was* one of the loss mitigation options for
19 which he could be considered. *Id.* at 13 (citing Dkt. #4-1 at 32, 43, 45, and 92) (emphasis in
20 original).

21 The Court finds that Mr. Tierney has adequately presented evidence to demonstrate a
22 likelihood of success on the merits of his RESPA claim. The above alleged violations of
23 RESPA can constitute unfair and deceptive acts under the CPA, warranting injunctive relief.
24 Defendants do not substantively address the remaining elements of a CPA claim. The Court
25 will, at this early stage, find that there is a sufficient likelihood that Mr. Tierney could succeed
26 on satisfying his CPA claims given the impact on the public interest inherent in RESPA cases.
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1 The Court need not address the remainder of Plaintiff's claims for likelihood of success,
2 finding that the requested relief is supported by the above.

3 **B. Irreparable Harm**

4 Defendants argue that even if Plaintiff's RESPA claims were viable, the remedy would
5 be monetary damages under 12. U.S.C. §2605(f), not a preliminary injunction. Dkt. #18 at 9.
6 Plaintiff does not directly respond to this point. However, even if Plaintiff's relief under
7 RESPA is limited to monetary damages, which can be recovered at the end of this action, he is
8 entitled to injunctive relief under his other causes of action, including the CPA cause of action,
9 which may proceed based on the violation of RESPA.
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11 Plaintiff argues that it is well-settled that being kicked out of his home can constitute
12 irreparable harm. Dkt. #12 at 17. The Court finds that, although there has been insufficient
13 analysis of this factor by both parties, it is satisfied.
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15 **C. Balance of Equities**

16 Defendants do not address this element. *See* Dkt. #18. The Court finds that equity lies
17 with Mr. Tierney, who is attempting to retain his home, and not with Defendants, who are
18 engaged in this purely as a matter of business.
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20 **D. The Public Interest**

21 Mr. Tierney argues that "[t]he wrongful conduct alleged herein and the governing
22 authority have a direct and significant impact on the public interest." Dkt. #12 at 18 (citing
23 cases). The Court agrees. Again, Defendants do not address this element. Considering all the
24 factors for granting a preliminary injunction, the Court finds that the requested relief is
25 warranted.
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1 **E. Rule 65(c) Security**


2 Federal Rule of Civil Procedure 65(c) provides that the Court may grant a preliminary
3 injunction “only if the movant gives security in an amount that the court considers proper to
4 pay the costs and damages sustained by any party found to have been wrongfully enjoined or
5 restrained.” Defendants “request that the Plaintiff be required to submit bond payments to the
6 court registry each month in the amount of \$1,889.51, the amount of the monthly mortgage
7 payment.” Dkt. #18 at 12. Mr. Tierney has been making this payment as bond for the prior
8 TRO. The Court finds that such bond is appropriate.
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10 **IV. CONCLUSION**

11 Having considered the briefing from the parties and the remainder of the record, the
12 Court hereby finds and ORDERS:
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- 14 1. Plaintiff’s Motion for Preliminary Injunction, Dkt. #12, is GRANTED.
- 15 2. The Defendants and their agents are enjoined from taking any action, directly or
16 indirectly, to foreclose on the property located at 28023 NE 140th Place, Duvall
17 Washington.
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- 19 3. This Order shall remain in effect until the close of this case, unless otherwise
20 ordered by the Court.
- 21 4. Bond is set in the amount of \$1,889.51, to be deposited in the court registry on
22 the first day of each month.
- 23 5. Defendants’ Motion to Dissolve TRO, Dkt. #11, is GRANTED IN PART as the
24 TRO is now moot. The parties are to meet and confer on any necessary actions
25 to resolve the TRO as issued in state court and the proper future placement of
26 the funds deposited in the state court registry.
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1 DATED this 25th day of March, 2021.

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5 RICARDO S. MARTINEZ
6 CHIEF UNITED STATES DISTRICT JUDGE
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